DOCKET NO. DBD CV-166036539 S	:	SUPERIOR COURT
ROY ESTATE LLC AND DOROTHY DAY HOSPITALITY HOUSE	:	J.D. OF DANBURY
V.	:	AT DANBURY
ZONING BOARD OF APPEALS OF THE CITY OF DANBURY AND SEAN HEARTY, ZONING ENFORCEMENT OFFICER OF THE CITY OF DANBURY	:	FEBRUARY 26, 2021

MEMORANDUM OF DECISION

I.INTRODUCTION

This is an appeal from the decision of the Zoning Board of Appeals of the City of Danbury affirming the cease and desist issued by the Zoning Enforcement Officer, Sean Hearty, to the Dorothy Day Hospitality House for the operation of a homeless shelter at 11 Spring Street in the City of Danbury. The plaintiff appeals the decision dated August 31, 2016 with legal notice published on the September 1, 2016.

II. FACTUAL/PROCEDURAL BACKGROUND

The property at issue is located at 11 Spring Street in the City of Danbury. The property is located in an RH-3 zone.[1] The record before the Zoning Board of Appeals noted the following history of the use and zoning involvement for the property. In 1983, the defendant first expressed an interest in the need for an emergency shelter in addition to the use of the property as a soup kitchen. (ROR Item 2) On August 31, 1983, two representatives from the Dorothy Day Hospitality House (DDHH) attended a work session of the Planning Commission to discuss setting up an emergency shelter in conjunction with the existing soup kitchen. (ROR Item 15) The planner for the city at the time, Mr. Jeff Ollendorf, told the

[1] The applicable Zoning Regulations of Danbury, Sec. 4.D.2a presently describe a permitted use in an RH-3 Zone as (1) apartment house. . . (2) church or other place of worship. . .(3) college or university. . . (4) firehouse. . . (5) garden apartment. . . (6) hospital. . . (7) housing redevelopment option . . . (8) nursery, kindergarten, elementary, or secondary school. . . (9) one family dwelling. . . (10) park, playground, or recreation facility. . . (11) parking area or parking garage. . .(12) police station. . .(13) row house. . .(14) three family dwelling. . .(15) two family dwelling . The regulations also provide special exception uses as follows: (1) business or professional office. . . (2) congregate housing. . . (3) continuing care facility. . . (4) day care center. . . (5) grocery store; laundromat. . . (6) medical office. . . (7) nursing home. . . (8) shelter for homeless. . .See sections 4.D.5.g and 7.F.3.b. . . (9) telephone exchange, sewage or water pumping station, . . . (ROR Item 1) However, dating back to 1983 the parameters of the RH-3 zone did not permit a homeless shelter. In 1989 there were amendments to the zoning regulations which allowed a homeless shelter as a permitted use. However, these amendments also provided that; [a]n approved zoning permit shall be required from the Zoning Enforcement Officer or his/her designees before any of the following shall take place: . . . the use of land, buildings, or structures is changed. . ." (ROR 1 p.10-2)

commission that no institutional use fit this request. Id. The applicants expressed concern about the impending winter and the minutes reflect that the commission had a feeling that "the concept is all right." (ROR 10DD) Thereafter the Planning Commission conducted a meeting on September 7, 1983 at which time the Planning Commission voted to send a letter that the site plan approval will not be required for interior renovations to the emergency shelter and that it would be allowed as a one year renewable accessory use to the soup kitchen. The Zoning Enforcement Officer was notified about this position on September 12, 1983. The October 12, 1983 application for a zoning permit designated interior alterations for an accessory use at the property as an emergency housing shelter. The application included under the Required columns, the site plan or waiver box was marked with the notation, "Planning Commission letter of approval dated September 12, 1983 (one year permit must be renewed as an accessory use.)" (ROR Item 70 p.25-26) A zoning permit was issued on the same day. The interior work to set up a shelter was done by students at Abbott Technical State schools with a cost of approximately $6,000. (ROR Item 12) After the passage of a year, the Danbury zoning official notified the operators of DDHH that the permit was expiring on October 12, 1984 and if they wished to continue the emergency shelter they needed to apply for re-approval. In response to this notice, Mr. McIleth from DDHH sent a letter for a second year approval of the shelter which was read to the Planning Commission. On October 17, 1984, the Chairman moved that a letter be sent to the Zoning Enforcement Officer that the emergency homeless shelter would be allowed for another year as a one year renewable accessory use to the soup kitchen. (ROR Item 2, Exh. H) The motion passed.[2] There were no other letters or requests for re-approval or renewal of the homeless shelter after the 1984 approval until the issuance of the cease and desist that is the subject of this appeal.

In 1989 the Zoning Regulations were amended to make shelters for homeless a permitted use in an RH-3 zone.[3] In January 2014, the Zoning Regulations were amended again as to homeless shelters. The 2014 regulations allowed for homeless shelters as a permitted use by Special Exception in an RH-3 zone.[4] The defendant sent several letters to the plaintiff stating that a new application for a special

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[2] The plaintiff contends that the Planning Commission did not take any specific action on the 1984 permit. Their vote is contrary to that representation. It is supportive of the requirement for re-approval/renewal.

[3] See fn. 1 as to the submission of a zoning permit.

[4] This timeline and series of events are followed as set forth in the letter from Attorney Sharon Dornfeld in response to a request by the Zoning Board of Appeals. (ROR Item 15)

exception was necessary for operation as a homeless shelter. (ROR Item 2, Exh.B) The plaintiff did not submit any application for a special exception` or otherwise related to the use as a homeless shelter in response to the 2014 amended regulations. Instead, the plaintiff filed an application with the Planning Commission for renewal of the 1983 and 1984 application. The Planning Commission would not act on this application upon advise of legal counsel. (ROR Item 70, at 10)

On February 23, 2016, the Zoning Enforcement Officer, Sean Hearty, sent a notice to the DDHH that it was in violation of the Zoning Regulations and a cease and desist was being served. The letter stated: "The Order alleges that the above property . . . is in violation of the City of Danbury's Zoning Regulations. . .the property is being operated as an emergency shelter without the required zoning approvals." (ROR 2, Item A, Exh. A) The letter/notice further states that it has sent letters to "Dorothy Day and/or its counsel on July 7, 2015 and October 7, 2015, reminding Dorothy Day of its failure to obtain the required approvals and asking that it apply for them promptly." (ROR Item 2 Exh. E) DDHH did not file any application for approvals with the zoning official. Instead, on March 7, 2016, Dorothy Day appealed the cease and desist order of the Zoning Enforcement Officer to the Zoning Board of Appeals in accordance with C.G.S. § 8-7. (ROR Item 2 Exh. B)

The Board held public hearings on May 12, 2016 (ROR Item 20A), June 23, 2016 (ROR 20B) and on August 25, 2016 (ROR 20C). The last meeting before the Board was limited to a hearing which permitted counsel to argue their positions. (ROR 20C).

At the conclusion of the August public hearing the Board requested information from counsel and postponed the decision to enable them to fully review the record. On August 31, 2016, the Zoning Board of Appeals denied the appeal and affirmed the decision of the Zoning Enforcement Officer to issue a cease and desist with a written decision of the unanimous vote. The Board stated as some of the reasons for affirming the cease and desist that: 1) the board failed to establish that the Dorothy Day Hospitality House has a current valid zoning permit; 2) it failed to establish a pre-existing non-conforming use; 3) it failed to establish laches; 4) it failed to establish that the Zoning Enforcement Officer lacked jurisdiction to issue the cease and desist order; and 5) for additional reasons as discussed in the letter from Attorney Sharon Dornfeld to the Zoning Board of Appeals dated August 25, 2016. (ROR Item 17)

The plaintiff appealed the decision of the Board setting forth the following four reasons to sustain the

appeal: 1) The Planning Commission of the City of Danbury had no jurisdiction in 1983 to determine whether a zoning permit should issue for the Property; 2) The City of Danbury Zoning Regulations did not authorize the issuance of a temporary zoning permit; 3) the zoning permit issued by the Zoning Enforcement Officer in 1983 was valid without the illegal condition; and 4) The Regulations cited by the Zoning Enforcement Officer do not apply because the emergency shelter is a pre-existing nonconforming use entitled to protection.

III. DISCUSSION

A. AGGRIEVEMENT

Pleading and proof of aggrievement are jurisdictional, and a prerequisite for maintaining an appeal. *Winchester Woods Associates* v. *Planning & Zoning Commission*, 219 Conn. 303, 307, 592 A. 2d 953 (1991). Aggrievement falls into two basis categories—statutory and classical. Statutory aggrievement exists by virtue of legislative fiat, rather than through an analysis of the facts for a particular case. *Weill* v. *Lieberman*, 195 Conn. 123, 124-35, 480 A. 2d 634 (1985). One claiming statutory aggrievement must show that a particular statute grants standing to pursue an appeal, without the necessity of demonstrating actual injury based on the particular facts at hand. *Pond View, LLC* v. *Planning and Zoning Commission*, 288 Conn. 143, 156, 953 A.2d 1 (2008). Classical aggrievement, on the other hand, requires a party to satisfy a well-established two-fold test: (1) the party claiming to be aggrieved must demonstrate a specific personal and legal interest in the decision appealed from, as distinguished from a general interest such as concern of all members of the community as a whole, and 2) the party must show that the specific personal and legal interest has been specifically and injuriously affected by the action which produced the appeal. *Cannavo Enterprises* v. *Burns,* 194 Conn. 43, 47, 478 A.2d 601 (1984).

General Statutes 8-8(a) (1) defines "Aggrieved Person" as "(1) . . . any person owning land that abuts or is within one hundred feet of any portion of the land involved in the decision of the board."

At the hearing before this court, it was demonstrated with the testimony of Joseph Simons that the plaintiff, Roy Estate LLC, is the owner of property at 11 Spring Street. The plaintiff provided the Warranty Deed for the property. (Exhibit 1, Book 672, page 418). Therefore, the plaintiff is statutorily aggrieved by the decision of the Zoning Board of Appeals. Because the plaintiff has demonstrated statutory aggrievement, it is not necessary to consider the claims of classical aggrievement.

B. STANDARD OF REVIEW

Following an appeal from a Zoning Enforcement Officer to a Zoning Board of Appeals, a court reviewing the decision of the Zoning Board of Appeals must focus, not on the decision of the Zoning Enforcement Officer but on the decision of the board and the record before the board. *Clemis* v. *Zoning Board of Appeals*, Superior Court, Judicial District of Ansonia-Milford, 2004 WL 2041972, 37 Conn. L. Rptr. 707. In an appeal from the Zoning Enforcement Officer's order, the Zoning Board of Appeals conducts a de novo review.[5] *Caserta* v. *Zoning Board of Appeals*, 226 Conn. 80, 88-89, 626 A.2d 744 (1993). C.G.S. § 8-7 provides that a Zoning Board of Appeals hearing such an appeal "may reverse or affirm wholly or partly or may modify any order, requirement or decision as in its opinion should be made in the premises and shall have all the power of the officer from whom the appeal has been taken but only in accordance with the provisions of this section." The "Board is in the most advantageous position to interpret its own regulations and apply them to the situation before it." *Doyen* v. *Zoning Board of Appeals*, 67 Conn. App, 597, 603, 789 A.2d 478, cert. denied, 260 Conn. 901 (2002). The Board is required to act without any deference to the findings or decision of the zoning enforcement officer.

"Zoning Boards of Appeal are entrusted with the function of deciding within prescribed limits and consistent with the exercise of a legal discretion, whether a regulation applies to a given situation, and the manner of its application." *Molic* v. *Zoning Board of Appeals*, 18 Conn. App. 159, 165, 556 A.2d 1049 (2008).

Thus the court reviews the record of the hearings before the Zoning Board of Appeals to determine if the plaintiff has proven that the findings of the Board are unreasonable, arbitrary or illegal. It is plaintiff's burden to prove that the Board acted improperly. In its review, the court examines the history of zoning regulations for this property, the action of the zoning authorities related to the property at 11

[5] During the public hearings on May 12, 2016 and June 23, 2016, there were many speakers discussing the social needs and aspects of the operation of a homeless shelter. The Board permitted everyone to speak and the defendant indicated in its brief to this court that the decision of the court is not a "referendum on the salutary nature of a homeless shelter, but solely for a judicial determination whether the Dorothy Day shelter complies with the applicable regulations." The court agrees with the assessment and thus this decision relies upon and analyzes the factual background and the connection to the legal requirements for establishment and continuation, if proper, of a homeless shelter as plaintiff argues in their appeal.

Spring Street as well as the legal direction provided to the Board from counsel to determine the present legal zoning status of the property at 11 Spring Street. In this regard, there were extensive documents of the various zoning applications, legal advice, and standards provided to the Board and testimony from the City officials and the plaintiff concerning this property.

C. THE VALIDITY OF THE 1983 AND/OR 1984 PERMITS WITH CONDITIONS

At the heart of the argument in this appeal is the original action of the Planning Commission which permitted an emergency homeless shelter as an accessory use to the soup kitchen after inquiry by representatives of the DDHH. The plaintiff claims that the Planning Commission had no jurisdiction in 1983 to issue a zoning permit. However, the plaintiff then argues that the plaintiff is stating these permits created a non-conforming use for the property. The plaintiff offers some divergent arguments as to the impact of the 1983 and 1984 permits with conditions. The plaintiff argues that the permits were for the establishment of a homeless shelter but the conditions attached to the approval are illegal and thus this Board and the court on appeal should find that the property is an approved homeless shelter that is valid to this day. On the other hand, the plaintiff continues to argue that the Planning Commission has no authority to grant such an accessory use. No matter what argument the plaintiff presented to the Board, the failure to apply for renewal of this accessory use for the emergency shelter is well documented in the hearings before the Board for this appeal and is the driving force for the Boards' decision that there was no current permit and no pre-existing use. However, the record demonstrates that although the plaintiff contends the condition was not legal they never challenged the condition as will be addressed below and in fact in 1984 the applicant was reminded of the need to renew and did so with no question as to the legality of the condition. The defendant argues that the condition was legal because of the circumstances and that the plaintiff never challenged it, thus requiring a yearly permit. There was also some argument by the plaintiff that the Planning Commission did not have the authority to grant such a permit but even if this is correct, it has no relevance to the present cease and desist because the plaintiff has ignored the approval. Because the original 1983 approval was approximately thirty seven years ago, it is not surprising that the individuals involved in zoning in 1983 are not able to provide any clarification of the action of the Commission. However, the minutes and some correspondence give this Board significant background and understanding of the issuance of the permit. This was in addition to the Zoning Enforcement Officer who testified extensively

at the public hearing on May 12, 2016 and provided these documents which establish the zoning history of the plaintiff at 11 Spring Street. (ROR Item 70).

The process began on August 31, 1983, with the appearance by Mr. McIlrath and Mr. Simonelli at a Workshop Session of the Planning Commission to address setting up beds in conjunction with the operation of the ongoing soup kitchen at 11 Spring Street.[6] The minutes of this meeting were part of the record before the Board and provide support for their finding as to the temporary nature of the shelter as an accessory use. In particular the 1983 minutes stated: ". . . [T]hey want to provide a shelter for as many homeless in Danbury as possible. They have a building in the same vicinity as the soup kitchen and they want to set up a home, free of charge, and run it *in conjunction with* the soup kitchen. They are looking for an emergency shelter - - not setting up a hotel or boarding house so to speak, but they don't know what ordinance covers this – they need help- . . ." (Emphasis Added) (ROR Item 70, p.37-39) The 1983 minutes then discuss the RH-3 zone and as the Planner states about this use, "nothing really covers it per se."[7] The Planner discusses his concern that if the applicant had to go to the ZBA it would "be the middle of the winter." Id. This expression of concern explains some of the urgency. This was certainly a humanitarian aspect to giving this permit but still addressing their responsibility for the health, welfare and safety of the public in accordance with the zoning concerns.

Commissioner Murphy said it is housing. It is "no charge, it is *temporary or emergency housing*." Id. The minutes do not include any request for a change in the use of the property and the discussion involves the temporary or emergency nature. This session was followed by an application from DDHH that requested an approval of "interior alterations only." The decision of the Planning Commission restricted the approval to an accessory use with a one year renewal. An accessory use was defined in the Zoning Regulation 4.C.2 as "customarily incidental to a permitted use . . . are permitted on the same premises." (ROR Item 70, 1983 Zoning Regulations). The approval noted on the application for Interior Renovations stated, "Planning Comm. Approval letter dated 9/12/83 one year permit must be renewed as an accessory use)." (ROR Item 70, at 25-26) Mr. Hearty explained in his presentation to the Board about the terminology, accessory use, and the reasoning as noted above is because of the

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[6] This notation of setting up beds is more consistent with the annual licenses from the health department to allow use as a "dormitory" until 2008. (ROR December 29, 2015 letter of Attorney Marcus)

[7] The 1983 Zoning Regulations submitted as part of Item 70 clearly show that this use was not a permitted use in RH-3 zone.

extraordinary circumstances.

The Board received a number of documents which explained more thoroughly and without supposition the basis of the 1983 and 1984 action by the Planning Commission. In addition, there was extensive background of this property and the activity since 1983 provided by Mr. Hearty to explain the basis of the cease and desist at the public hearing on May 12, 2016. He provided a wealth of documents and utilized them as a road map of events that resulted in his issuance of the cease and desist order to the plaintiff. (ROR Item 20a and Item 70) It is these documents submitted as an additional Return of Record, Item 70, that overwhelmingly provided the Board with much of the background and support for its' decision. Each of the reasons for the denial were part of the presentation to the Board and the letter thereafter by their counsel, Attorney Dornfeld.

The presentation by the plaintiff to the Board was a mix of arguments with no solid information that would lead anyone to believe the 1983 approval as well as the 1984 approval was any more than a one year permit. This is not to say if the plaintiff provided information and documentation that established within the time, the activities at the site, the zoning authorities would have reviewed a proper application for a special exception or other requests and permitted the use to continue without interruption. This did not happen because the plaintiff never submitted an application for this use within the zoning regulations. In addition, at the conclusion of the arguments by counsel on June 23, 2016, the Board requested and received an opinion letter from their counsel, Attorney Dornfeld addressed legal questions from the Board to help them understand and decide the appeal. This letter very much like the explanation of Mr. Hearty provided background and the law that supported their final decision. (ROR Item 15)

The plaintiff continues to argue that it received approval for a use within the RH-3 Zone for a homeless shelter and that the Board should recognize and allow the continuation of this approval.[8] The plaintiff ignores the actual facts established in the 1983 and 1984 applications, the information provided

[8] Although making this representation, the letter of Attorney Marcus dated December 29, 2015 requests that the Planning Commission approve the permit as it did in 1984 to continue a homeless shelter. Thus, this request recognizes that the property did not have an approved or continuing permit for a homeless shelter. This application and argument is also inconsistent with appeal in this case that the Planning Commission did not have jurisdiction to approve a permit or that the temporary permit was impermissible pursuant to the regulations. (ROR Item 70)

to the Board by individuals representing the Dorothy Day Hospitality House and the final 1983and 1984 decision of the Board to permit an accessory use (not a special exception, variance or any other land use approval) for the "emergency" use. No one except Mr. Hearty addresses the meaning of the permit as an accessory use to the soup kitchen or the concerns about the approval because of the limited time to permit the accessory use necessitated because of impending winter weather. Even the testimony of Mr. McIlarth at the May 12, 2016 hearing does not offer any clarification of the failure to even address the one year renewable permit to have a homeless shelter as an accessory use to the soup kitchen. When asked why no letter was sent to the Planning Department after 1984 he responded: "I don't know exactly why. I'm guessing that it might have been the same reason that the State of Connecticut said, okay, they declined our grant but they are the only ones doing it so give it to them anyway. . ." (ROR Item 20a at 23) The remaining comments by Mr. McIlrath offer no rationale but he does discuss that fact that they had contact with other departments. He gave no reasons and did not testify that they were a permitted use. He does not offer any testimony that they challenged or questioned the approval or the condition even at the time of renewal. However, the testimony of Mr. Hearty explained the 1983 process by stating to the Board that "it is extraordinary because they are making a condition saying that we understand the need for it, but we are going to be careful. So we are going to give you one-year extensions so you come back and we will revisit it again. . ." His thorough and insightful presentation to the Board gave overwhelming information for the Board to determine that the 1983 and 1984 approvals with or without conditions did not give an unfettered right for the operation of a homeless shelter at the site of the soup kitchen. (ROR 20A at 38) He clearly supported his position that the permit is no longer valid.

The plaintiff argues that the condition of approval was illegal and thus the court should not consider the failure of the plaintiff to renew the application after 1984.[9] This is a smoke and mirrors argument. In other words, let them operate without addressing concerns for the public health, safety and welfare as is their responsibility. The plaintiff presents a number of conflicting arguments about the legality of the 1983 and 1984 one year permits for an accessory use. Putting the inconsistent arguments aside, the court does not examine and determine the legality of the permit with conditions at this time

[9] The court will address this failure to challenge the condition for the approval below.

because the plaintiff failed to challenge these permit approvals at the time of their issuance in 1983 and 1984. For two years the plaintiff accepted the approval and followed the conditions for the emergency homeless shelter. Then for 31 years the plaintiff remained silent on the issue of the accessory use for a homeless shelter at the property. In the legal opinion letter from Attorney Dornfeld to the Board she recognizes the failure to challenge the condition. Attorney Dornfeld brings the Board's attention to the applicable law that does not permit a collateral attack on the validity of the underlying zoning decision that was not challenged at the time it was made. *Upjohn Co.* v. *Zoning Board of Appeals*, 224 Conn. 96, 102, 616 A.2d 793 (1992) (ROR Item 15). In this appeal the defendant relies upon the decision of *Torrington* v. *Zoning Commission*, 261 Conn. 759 (2002) to support their position that the plaintiff cannot collaterally attack the condition for approval. The *Torrington* court referred to the decision in *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 96, where the court stated that ". . . one may not institute a collateral action challenging the decision of a zoning authority . . . the rule requiring interested parties to challenge zoning decision in a timely manner "rest[s] in large part . . . on the need for stability in land use planning and the need for justified reliance by all interested parties – the interested property owner, any interested neighbors and the town – on the decisions of the zoning authorities." Id., 102. The *Torrington* court did addressed the exceptions to this policy but restricted it only to instances where there may be a strong public policy. In particular, the court considers whether the zoning body has a plain and obvious lack of jurisdiction. The plaintiff argues that there is a lack of jurisdiction but in viewing the facts and the testimony before the Board, it was obvious that the plaintiff was the impetus of the zoning request ad strongly supported the decision which was an expansion of their normal applications to find a avenue of approval for the establishment of a well-intentioned project. An accessory use with conditions was a compromise to address the concerns of the plaintiff. Having recognized this however, the record makes it clear the plaintiff had every opportunity to litigate the question of jurisdiction and the conditions, but why would the plaintiff challenge the authority when they requested the guidance to support their charitable efforts. The plaintiff recognized the Planning Commission as the authority and worked with it. Thus, it was not all obvious to any party that the Planning Commission did not have authority. The actions of all sanctioned the Planning Commissions power to act and in doing so to incorporate conditions of approval as a check for the public health, safety and welfare. Mr. Hearty explained the purpose of the condition of a yearly renewal to monitor

the shelter as a new and different organization especially with the emergency nature of the approval. The conditions attached to protect the public do not create a finding that the Planning Commission acted beyond its jurisdiction. See *Wolff* v. *Town of Watertown*, 2004 WL 772427 *5 (Conn. Super.) (Holzberg, J.) It was obvious based upon the presentation that not only was the Zoning Enforcement Officer's decision in 1983-1984 correct but that all involved parties at that time had an opportunity to address needs or concerns. The plaintiff does not provide any strong public policy in this appeal. A question that the conduct or condition is a violation of applicable zoning statutes or regulations is not enough. There is a very high standard. *Torrington* v. *Zoning Commission*, supra, 261 Conn. 768. The plaintiff has not satisfied this burden.

Thereafter, in 1989 when the amendment to the zoning regulations was adopted to permit as a right a homeless shelter in an RH-3 zone, the plaintiff once again did nothing. In 2014 when the regulations were changed again to permit the use with a special exception, the plaintiff did nothing. At none of these intervals did the plaintiff seek zoning compliance or file for a permitted use as a homeless shelter. In the letter of plaintiff's counsel dated December 29, 2015 he challenges for the first time, the conditions for renewal from the 1983 approval for an accessory use, and then goes on to recognize the validity of the Planning Commission actions in 1983 by asking the Commission "to place this matter on your agenda to allow Dorothy Day to present to you any information that you deem to be appropriate to allow the Planning Commission to renew the permit as it did in October 1984." (ROR Item 70) Even if this was accepted by the Planning Commission which it did not based upon legal advice, the added confusion for this request is that the 1984 approval was not for a "homeless shelter" but was for an accessory use with a condition of renewal in one year.[10] What was the plaintiff requesting?

Thus, the Board properly determined that the 1983 and 1984 approvals with or without the condition are irrelevant. The plaintiff failed to challenge the permits for an accessory use or the condition of a one year renewal. The permits ceased to be in effect in 1985 and since then there has been no review thus

[10] The plaintiff muddies the waters even more so by arguing at the May 12, 2016 public hearing that the 1984 letter form Planning is unavailable and thus leading to the inference that the 1984 approval for renewal did not have a requirement for renewal. This is rebuked by Mr. McIlrath and also by the October 1984 minutes in which the action of the Commission was reported that, "Mr. McLachlan moved that a letter be sent to the Zoning Enforcement Officer stating that the emergency housing shelter will be allowed for another year as a one year renewable accessory use to the soup kitchen. . ." (ROR Item 20a Tr. At 19-20)

no approval, thus no legal use. The plaintiff does not have a valid permit which it can now renew and any continuation without an approval would be an illegal use of the property.

The Board properly found that based upon the records of the zoning authorities and the opinion of their legal counsel that the 1983 and 1984 approvals with a condition are not relevant to the present cease and desist order because the plaintiff did not have a valid zoning permit because the permits were in effect for a year thereafter requiring renew which the plaintiff failed to challenge or to submit an application for such renewal. There is overwhelming support for the finding of the Board after reviewing the records and hearing the argument of the representatives to reasonably determine that the permits issued in 1983 and 1984 are no longer valid because the plaintiff chose not to renew the permit. The court next addresses the argument that the operation at 11 Spring Street is a preexisting non-conforming use and thus the Zoning Board's decision to affirm the cease and desist must be reversed.

D. NON CONFORMING PREEXISTING USE

General Statutes Sec. 8-2 provides that municipal; zoning "regulations shall not prohibit the continuances of any non-conforming use . . .*existing* at the time of the adoption of such regulations. . ." (Emphasis added.) The plaintiff bears the burden of proving the existence of a non-conforming use. *Pleasant View Farms Development, Inc.* v. *Zoning Board of Appeals*, 218 Conn. 265, 272, 588 A.2d 1372 (1991). A nonconformity is a use or structure prohibited by the zoning regulations but is permitted because of its existence at the time that the regulations were adopted. *Adolphson* v. *Zoning Board of Appeals,* 205 Conn. 703, 710, 535 A.2d 799 (1988) The rule concerning the continuance of a nonconforming use protects the right of a user to continue the same use of the property as it existed before the adoption of a zoning regulation that prohibited the use. *Cioffoletti* v. *Zoning Commission*, 24 Conn. App. 5, 8, 584 A.2d 200 (1991).

Based upon the above argument this court has determined that the Board correctly determined that the plaintiff's 1983 and 1984 approvals for an accessory use ended when they failed to reapply or challenge the one year permit. The plaintiff's argument that they have a preexisting non-conforming use is controlled in part by the above argument and decision of the Board that the plaintiff without having continued to renew or challenge, no longer has a valid approval for use of the property as a homeless shelter. The plaintiff argues without support that because they had an approval in 1983 under

very limited conditions, that allows them a forever use of the property as a homeless shelter under the doctrine of a nonconforming preexisting use. This argument has a number of legal and factual flaws. The major legal flaw is that the plaintiff itself allowed the use with an approval to lapse and thus the use became illegal. Additionally, the plaintiff did not have recognized legal use since 1984. During the time period from 1984 until 2008 the plaintiff applied for a dormitory license but never for a recognition as a homeless shelter. However, even the application for this license ceased. Additionally, although the plaintiff is adamant that the use is a preexisting nonconforming use, upon the issuance of the cease and desist the plaintiff submitted an application to permit the renewal for an accessory use for the homeless shelter to the Planning Commission. The plaintiff did not provide any substantive information to demonstrate the actual and legal operation of the shelter. In fact even some of the licensing requirements that the plaintiff refers to lapsed. Attorney Marcus sent correspondence to the Planning Commission in which he stated that, "Based on the zoning history of this property and this use, it appears that the Planning Commission may need to act as it did in the past to approve a one-year extension of the zoning permit based on the waiver of site plan as it originally did in 1983 and 1984." (ROR Item 70 Exh.) The letter from Attorney Marcus requests that "you place this matter on your agenda to allow Dorothy Day to present to you any information that you deem to be appropriate to allow the Planning Commission to renew the permit as it did in October 1984." Id. He also describes the actions of the plaintiff in filing for Planning Commission approval as a "Bona fide attempt to comply with a *Lapse* in a filing with the Planning Commission." (Emphasis added) (ROR Item 20 A, p. 15). In effect there was a lapse of 31 years with no action to legalize the use. In order to be a non-conforming use the use of the property must have been in existence and lawful at the time the restriction is imposed. *Helicopter Associates, Inc.* v. *Stratford*, 201 Conn. 700, 712 (1986). Thus, the testimony and documents before the Board demonstrate that there was, at the time of the cease and desist, no actual or legally permitted non-conforming use of the property from 1983, 1985 or anytime thereafter.

As part of argument of a pre-existing non-conforming use, the plaintiff raises a second argument that the amendment of the Regulations in 1989 permitting a use as a Homeless Shelter applied to make this property a legally permitted use. This argument must also fail. The plaintiff does not consider all the requirements for determining that the use is permitted. The plaintiff ignores the zoning requirements.

As part of the recognition of the permitted use, the owner is required to file a zoning permit. The purpose of this permit is to be certain the use satisfies the public health, welfare and safety. Mr. Hearty testified in the hearings that in 1989 the regulations were amended to allow homeless shelters as a permitted use. Unlike plaintiff's interpretation that they just establish a use, the zoning regulations require some control. Section 10.B.1.a.(4) provides that "[a]n approved zoning permit shall be required from the Zoning Enforcement Officer or his/her designee before any of the following shall take place . . . the use of land, buildings or structures is changed . . ." (ROR I) There is no dispute that this provision was in effect in 1989 when the regulations were amended to permit a homeless shelter. Thus, without filing the zoning permit with the Zoning Enforcement Officer the use is not permitted. The plaintiff has not provided any documentation that it submitted a zoning permit for this property. Mr. Hearty has no information as to the submission of any permit and has cited this section of the Regulations as a requirement that was not satisfied by the plaintiff before issuing the cease and desist. The requirement of a zoning permit is recognized for the ability to control the health, welfare and safety of the residents as part of the zoning responsibilities.

The plaintiff never addressed the need for a zoning permit in 1989 and thus any use as a homeless shelter in 1989 would be illegal. The plaintiff has only one choice to allow the proper operation of the homeless shelter within the zoning requirements and that is an application for a special exception.

The Board had overwhelming testimony, documentation and interpretation of the zoning regulations of the City of Danbury in support of the finding for the issuance of the cease and desist at 11 Spring Street. The law does not support a finding of a non-conforming use given the facts and circumstances in this appeal. The Board properly determined that the plaintiff does not have a preexisting non-conforming use for a homeless shelter on the property.

IV. CONCLUSION

Based upon the above, the appeal by Roy Estate, LLC is overruled and the decision of the Zoning Board of Appeals to affirm the cease and desist issued to Dorothy Day Hospitality House by the Zoning Enforcement Officer is affirmed.

THE COURT

Brazzel-Massaro, J.